or not a reasonable man in the same circumstances would have been aware of the likelihood of damage or injury to others resulting from such conduct and taken adequate and proper precautions to avoid causing such damage or injury. This test is partly objective and partly subjective — objective in the sense that the situation must be one fraught with potential risk of injury to others or whatever consequences contemplated in any particular section of the Penal Code. It is also subjective in that such a situation should have arisen by reason of some fault on the part of the accused. See *Regina* v. *Gosney*[6] *per* Megaw LJ at page 347".

Consequently, when the reference came up for hearing in *Joseph Chin Saiko* v. *Public Prosecutor*[1] the first question was abandoned. As to the second question the Federal Court stated that the answer to the second question should be in the negative. In *Public Prosecutor* v. *Joseph Chin Saiko*[2] I expressed the view that the test of "a reasonable and prudent driver would exercise in the circumstances" as laid down in *Simpson* v. *Peat*[7] and adopted by *Voo Yun Fatt* v. *Regina*[8] could be applied to section 304A bearing in mind the additional element required to be established. This view must now be regarded as wrong in the light of the answer given by the Federal Court to the second question.

As the learned magistrate convicted the appellant on both charges and as the dictum in *Public Prosecutor* v. *Joseph Chin Saiko*[2] undoubtedly influenced his decision to convict appellant of the charge under section 304A of the Penal Code I would allow the appeal on this charge. However, on the evidence he was entitled to convict the appellant on the charge under section 14(1) of the Road Traffic Ordinance (Cap. 128). I would therefore not interfere with this conviction and the endorsement.

The result is that the conviction on the first charge is quashed and sentence set aside. The conviction on the second charge is confirmed.

His Lordship the Chief Justice pointed out that in West Malaysia in the case of fatal accidents, section 304A of the Penal Code seemed to have been rendered practically redundant by section 34A of the Road Traffic Ordinance, 1958. I may add that in Sarawak there is section 26 of the Road Traffic Ordinance (Cap. 131). However, in Sabah there is no provision in the traffic legislation similar to that of West Malaysia or Sarawak. Perhaps it is time that the legislature consider the inclusion of a similar provision in the Sabah traffic legislation.

Order accordingly.

CHUA GUAN KENG v. PUBLIC PROSECUTOR

[A.Cr.J. (B.T.H. Lee J.) January 12, 1973]
[Kuching — Criminal Appeal No. K 17 of 1972]

Criminal Law and Procedure — Summary procedure — Duty of court at end of prosecution case — Difference in procedure in Peninsular Malaysia and in Sarawak — Sarawak Criminal Procedure Code, (Cap. 54), s. 163.

This was an appeal against the conviction of the appellant on charges of fradulent evasion of customs duty and failure to give correct information in respect of goods declared under the Customs Act, 1967 and the Sales Tax Act, 1972, respectively. The learned magistrate in this case in calling on the appellant for his defence at the trial had relied on the case of *Wong Ah Mee* v. *Public Prosecutor*[1] decided on section 173(f) of the F.M.S. Criminal Procedure Code.

Held: (1) the relevant provision in Sarawak is section 163 of the Sarawak Criminal Procedure Code which differs from section 173(f) of the F.M.S. Criminal Procedure Code, as it empowers the magistrate to call on the accused for his defence if there is evidence which if believed would warrant his conviction;

(2) in this case there was ample evidence if accepted by the magistrate to warrant the conviction of the appellant and therefore the appeal must be dismissed.

Cases referred to:-

(1) *Wong Ah Mee* v. *Public Prosecutor* [1970] 1 M.L.J. 98.
(2) *Public Prosecutor* v. *Omar Lopez* [1967] 2 M.L.J. 281.
(3) *Mahadi* v. *Public Prosecutor* [1970] 1 M.L.J. 17.
(4) *Evans* v. *Bartlam* [1937] 2 All E.R. 649.
(5) *Mahasen* v. *Public Prosecutor* [1970] 1 M.L.J. 256.
(6) *Lim Tong* v. *Public Prosecutor* [1938] M.L.J. 41.

CRIMINAL APPEAL.

Joseph Tang for the appellant,

Steve Shim (Deputy Public Prosecutor) for the respondent.

B.T.H. Lee J.: In this case the appellant was charged in the District Court, Kuching, as follows:—

1st Charge

"That you on 4th day of April, 1972, at Kuching Port, Kuching were knowingly concerned in an attempt at fraudulent evasion of Customs duty, to wit, $888.56 being the difference between the duty on $3,847.58 and $920.00 leviable by law on goods imported into the State of Sarawak from Singapore and you have thereby committed an offence under section 135(1)(g) and punishable under section 135(1)(i) of the Customs Act, 1967."

2nd Charge

"That you on 4th day of April, 1972, at Kuching Port, Kuching failed to give correct information in respect of goods declared vide Import Declaration No. 110752 for which the correct value should be $3,847.58 instead of $920.00 and thereby committed an offence under section 43(d) of the Sales Tax Act, 1972, and punishable under the same section of the said Act."

The appellant was convicted on both charges and fined $5,000 on the 1st charge and $1,000 on the second charge.

Against that conviction appellant appealed on a number of grounds. It is to be observed that the prosecution in the lower court was conducted by a customs officer.

The first matter to which I desire to call attention is that considerable confusion has arisen from failure on the part of magistrates to keep in view the statutory provisions of the Sarawak legislation and in particular the Sarawak Criminal Procedure Code in this case.

Magistrates should take warning that when Malayan authorities on the construction of Malayan Ordinances are quoted they should be carefully scrutinised to ascertain whether the portion of the Malayan Ordinance in question is the same as the corresponding portion of the corresponding Sarawak Ordinance.

If the two portions are the same, then, in the absence of any local decision to the contrary, any decision of the Malayan courts can safely be followed.

If the portions are different, then any decision of the Malayan courts should be studied with very great care lest it should turn not on a point on which the Ordinances correspond but on a point on which they differ.

Had such a course as indicated above been followed by the magistrate in the present case, it would have been clear that the Malayan case which was relied on depended solely on a point on which the two Ordinances differed and it would therefore have been properly disregarded.

In this case the learned magistrate had relied on the case of *Wong Ah Mee* v. *Public Prosecutor*[1] where she said:

"The established principle on whether there is a case to answer or not is stated in *Wong Ah Mee* v. *Public Prosecutor*[1] at pg. 99 where it was stated that the prosecution must adduce sufficient evidence which if unrebutted, would warrant a conviction at the close of the prosecution case."

This is based on section 173(f) of the Criminal Procedure Code (F.M.S. Cap. 6) which reads as follows:

"If, upon taking all the evidence hereinbefore referred to, the court finds that no case against the accused has been made out which if unrebutted would warrant his conviction the court shall record an order of acquittal."

Our section is section 163 of Sarawak Criminal Procedure Code (Cap. 54) which provides as follows:

"If, upon taking all the evidence referred to in section 162 and asking such question, if any of the accused under section 201 as the court considers necessary it finds that no evidence has been adduced which, if believed would warrant his conviction, the court, may, subject to the provisions of section 171, record an order of acquittal."

Public Prosecutor v. *Omar Lopez*[2] a decision of the High Court, Kuching, accurately sets out the position in law concerning section 163 of the Sarawak Ordinances.

The headnote to the above case states:

"At the close of the prosecution upon submission being made a magistrate must ask himself not whether he is satisfied that the prosecution has proved the case beyond reasonable doubt but whether there is evidence which if believed by reasonable men — it follows that it must be capable of such belief — would justify such men in convicting the accused of the offence charged. If he comes to the conclusion that there is no such evidence then he may acquit. If, however, he considers that such evidence does exist he should rule that there is a case to answer. It is then a matter for the accused, or his counsel, to decide what to do. He may say nothing and rest upon the submission, or he may make an unsworn statement, or give evidence on oath and call witnesses in the normal way. In any of the above events it will then fall to the magistrate to consider the total of the evidence that is then before him and applying the normal test that is applied in a criminal prosecution decide to his own satisfaction the guilt of the accused."

It is however to be observed that this is a mere re-statement of what was said by Lord Parker C.J. in the *Practice Note* [1962] 1 All E.R. 448.

It is then next suggested by counsel for appellant that the court is presumed to know the law. It is, of course, both regrettable and unfortunate that in the lower courts young magistrates have not been given the necessary assistance from counsel which they have a right to receive at their hands. That this ought to have been done is illustrated in the case of *Mahadi* v. *Public Prosecutor*.[3]

It seems to me important to bear in mind that there is in law no presumption that anyone even a judge knows all the law. The fact is that there is not and never has been a presumption that everyone knows the law. There is however a rule that ignorance of the law does not excuse, a maxim of very different scope and application. (See *Evans* v. *Bartlam*[4]).

It may be convenient if I add here the following observation from Boulton's Conduct and Etiquette at the Bar, 4th Edition, at page 73:

"Any deception of the court must be avoided.
As regards a point of law, counsel is called upon to put before the court any relevant binding decision which is immediately in point, whether it be for or against his contention; . . . ."

I now turn to the facts.

There was in my opinion ample evidence if accepted by the magistrate to support the conviction.

That the appellant was fully aware of the contents of the seven packages is no doubt borne out by the evidence of the two customs officers *viz.* PW1 and PW3.

It is to be pointed out at the very outset that appellant had made a declaration (Ex. P14). This was rejected by the customs officer (PW6) on the ground that she had no trade licence.

The declaration form (Ex. P14) contained only two items. They are:

(1) 10 sets Pavo — 16 Tape-recorders.
(2) 12 sets Pavo — 16 Tape-recorders.

A second declaration (Ex. P11) was made. They contained the following:

(1) Pavo — 16 Tape-recorder (10 sets)
(2) Pavo — 16 Tape-recorder (12 sets)
(3) Cassette P — 16 Tape-recorder (10 sets).

The only difference between the first declaration and the second declaration is the additional item (3) — 10 sets of cassette.

The customs officer (PW3) who examined passengers goods upon arrival at Pending Port asked appellant on 30th March, 1972, whether she had anything to declare. She replied she had seven packages of goods and some personal clothings in a bag.

That being so, the customs officer began his examination. From the first package he found it to contain radio phono and tape-recorder. He asked appellant about the rest of the packages and appellant replied they contained the same articles. This officer requested appellant to make a proper declaration while the goods were detained.

A few days later *i.e.* 4th April, 1972, PW3 began his examination of the packages whereupon appellant requested him to stop as she could not remember the contents of the packages.

It must here be observed that appellant had already made a written declaration (Ex. P11) to which reference has been made as to the contents and PW3 was checking the goods with the declaration to ensure that the matter stated in the declaration form tally with the goods.

He found that the appellant had failed to declare the following ten items. They were set out on the reverse of Exhibit P11. The items are:

(1) 19 sets Sunny-Vox Radio x Phonograph Model RP-2000;
(2) 2 sets Sierra Radio recorder Model SA 7369;
(3) 4 sets Deluxe Cassette Tape recorder Model R-100;

(4) 18 pcs. ladies gown;
(5) 6 pcs. ladies long white trousers;
(6) 13 pcs. Fonta Miracle conditioning cream;
(7) 22 boxes x 1 doz. "Flying Wheel" cotton thread;
(8) 11 boxes cold wane wrap paper;
(9) 16 sets Pavos Cassette Tape recorder Model P-16;
(10) 3 ladies wigs;

and it must be remembered that these goods are dutiable.

It falls to be observed that appellant had failed even to declare the radios although the customs officer (PW1) in his evidence stated that appellant told him she had 7 packages of tape-recorders and radios.

Another customs officer (PW3) in the course of examination opened one package and found it to contain radio phono and tape-recorders. He did not examine the other packages. When she was asked what the other packages contained appellant's reply was they contained the same thing i.e. radio phono and tape-recorders.

Yet when appellant declared on form (Ex. P11) the reverse of Exhibit P11 shows plainly that appellant had even in this respect failed to declare:

(1) 19 sets Sunny-Vox Radio x Phonograph Model RP-2000;
(2) 2 sets Sierra radio recorder Model SA 7369;
(3) 4 sets Deluxe Cassette Tape recorder Model P-16.

It is not disputed that the appellant made the declaration in the full knowledge that it was a declaration of dutiable goods and that the declaration was tendered to the customs authority.

Questions of knowledge like intention are purely questions of fact. They are logical conclusions or inferences to be drawn from the primary facts established (*Mahesan* v. *Public Prosecutor*[5]).

Guilty knowledge can reasonably be drawn from the circumstances. If appellant submitted the declaration (Ex. P11) and if the trial magistrate upon the evidence believes the prosecution story that in fact appellant knew what the goods in the packages were and made an incorrect or untrue declaration the court could have inferred guilty knowledge.

Admittedly this is as seems to have been the opinion of the court below a document calculated to mislead and deceive the customs.

It is clear from the decision of the Court of Appeal in the case of *Lim Tong* v. *Public Prosecutor*[6] that the Court of Appeal has power to dismiss an appeal notwithstanding a misdirection in law where no failure of justice has been occasioned by such misdirection. The misdirection as to onus in such circumstances as the present has in fact erred in favour of the accused person and has not in my judgment occasioned a failure of justice.

It was alleged that the learned magistrate failed to consider the defence.

With respect the judgment of the magistrate has at page 19 discussed the defence in considerable detail. I quote from the second paragraph:

"The accused told P.W.3 that she was taking delivery on behalf of someone else. The accused further add *(sic)* that she would supplement her declaration if there were other things in the box only after P.W.3 had refused her to make a new declaration and proceeded with the examination."

and lower down:

"The accused had asserted all along that she did not know the full contents of the packages but she told P.W.2 and P.W.3 that they contained radios and tape-recorders. She need not have to make a declaration at all if she was not sure as to the full contents of the packages.

The accused in her defence gave evidence that she had never declared anything before, but added on previous occasion custom would open her goods and allow her to pay duty there and then.

The court cannot believe the accused was the innocent tool which she claimed to be and she was clearly shown to be dishonest although in my opinion by no means stupid, although it is probable she was not the only person involved in the scheme."

It was established in evidence that the boxes had been with the accused at the time the boat Raja Brooke left Singapore for Kuching.

The magistrate has rejected the story given by the accused.

I have read this record with some care and have listened to counsel, but the magistrate saw the witnesses and heard them give evidence and I can see nothing wrong in the grounds of decision. It appears to me that the accused's defence did not raise a doubt in her mind and, therefore I think the conviction is right.

In the opinion of this court there is no substance in the other grounds and this appeal fails and must be dismissed.

Appeal dismissed.

MAASAH BIN DERAMAN v. PUBLIC PROSECUTOR

[A.Cr.J. (Pawan Ahmad J.) January 12, 1973]
[Malacca — Criminal Appeal No. 26 of 1972]

Road Traffic — Carrying on lorry load in excess of permitted weight — Weigh-bridge — Weight of lorry and load to be certified by officer in charge of weigh-bridge — Certification of examination of weigh-bridge — Road Traffic Ordinance, 1958, ss. 53, 120, 139 and 143.

In this case the appellant appealed against his conviction on a charge of abetting the offence of carrying on a lorry driven by him a load in excess of the permitted weight. It appeared that the lorry was stopped and taken to a police station, where it was handed to a police sergeant, a duly authorised officer under section 53 of the Road Traffic Ordinance. The sergeant took the lorry to the weigh-bridge of the Road Transport Department, Malacca, weighed the lorry and found that weight was in excess. He did the weighing himself and served a copy of the weighing card to the appellant.

Held: (1) while the vehicle in question can be stopped and taken to the weigh-bridge by an officer duly authorised under section 53 of the Road Traffic Ordinance, the duty of the officer does not extend to the weighing of the vehicle;

(2) the weighing of the vehicle must be done by the public servant in charge of the weigh-bridge and not by any other person;

(3) the certificate to be issued under section 143(7) of the Road Traffic Ordinance can only be issued if the weigh-bridge has been examined and found accurate by an inspector